INNOVATION, CSR, ETHICS, FISSCHER AND THE LAW: A SPECIAL REVIEW OF BOOKS[1]

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On many occasions the author of this review had the pleasure to work with Olaf Fisscher (hereafter: O.F.). A couple of times we even co-operate intense while supporting young scholars on their way to academic maturity, finishing their dissertational work of science. Performing of course in the European continental academic tradition we worked complementary as (co-)promotor overlapping our fields of science in search of synergy. For a business legal studies professor working with O.F. is an easy walk from subject to subject because he has a certain affinity with legal reasoning and the law. Frequently ethical issues and professional matters of integrity shine through legal issues and debates. More than once I have experienced that he appreciates that generally desired results were pursued by legal means although he tends to assess these means as second best. Individuals and organisations should strive after these results not because legal agencies threaten to apply sanctions but preferably because some inner incentive moves them to do so. We agree so far. But when it comes to the distinction between horizontal supervision and vertical systems of surveillance our visions tend to separate. The task of an agency is to keep an eye on the degree of compliance of business organisations with rules and regulations. The traditional way of doing this is to issue a warning first and then after a while revisit the company site and impose sanctions if necessary. Some modernists who tend to rise in number characterise this traditional vertical approach wrongly old-fashioned and prefer a so-called "responsive" approach to reach results. Their method of supervision is coined horizontal, their approach is not to threaten but to educate legal subjects and explain why alternative behavior is desirable. I have a shrewd suspicion that O.F. is a follower of this horizontal fashion whereas I resent negotiations on (not) applying proper sanctions for a number of reasons, being the most important one a risk of unequal treatment. However, fortunately professors do not need to agree on everything to co-operate effectively and with pleasure.

Evaluating all kinds of legal aspects of themata O.F. worked on during his academic career, at least until today, a useful distinction seems to me that between the well-known normative characteristic of law and regulations and the far less frequently mentioned instrumental function. In short, the normative feature of rules and regulations limits the margins within business management operates. Not seldom there is a need for managerial innovation and creativity to have enough operational room for manoeuvre. A striking example of this on the level of strategic business policy is no doubt the impact of antitrust law – or in continental european terms: competition law – on erecting strategic alliances. This branch of the law

[1] Published as: Brack A., (2012), Book review; Innovation, CSR, Ethics, Fisscher and the Law, *Creativity and Innovation Management*, 21(2), 238-241. Permission for reprint granted by Wiley-Blackwell.

brings about a lot of constraints for businesses. This is quite in contrast with the other aforementioned instrumental function of legal concepts within the law. Unlike parts of the law aiming to push human beings and legal persons into politically and perhaps even societally desired directions, instrumental legal concepts, by definition, are neutral of nature. For instance, an agreement in the legal appearance of a contract is an instrument to establish operational certainty, something management can be sure of. And a legal person can be a building block to form a whole of interdependent business organisations in an economic group like a public limited company (plc). That a mixed legal concept like for instance employee participation shows both characteristics, that is a normative compulsory co-determination of workers and an instrumental tool to build commitment of employees with the mission and goals of their employer, detracts nothing from the value of both distinctive legal functional features.

Holding an academic position with the privilege to act as a PhD supervisor, one occasionally encounters a dissertation of which one would have liked being the supervisor oneself. I am convinced that O.F. as much as my self envy the supervisors of:

T.E. Lambooy, Corporate Social Responsibility – legal and semi-legal frameworks supporting CSR, Kluwer Deventer, The Netherlands, 2010[1]

In fact we would have been the perfect professorial couple to support the process of the writing of this thesis which was publicly defended on 23 November 2010 at Leiden University, The Netherlands. The author[2] and her two supervisors, professors L. Timmerman and A.G. Castermans, deserve to be congratulated with the published result of their academic efforts. This book approaches CSR broadly and looks at some developments in this field in the period 2000-2010. Legal interfaces with CSR have been studied, diverse relevant legal subjects are covered and combined with several case studies in this impressive and voluminous book of almost 800 pages.[3]

What makes CSR for many scholars such a fascinating subject to research is that it does not bother about the dichotomy private versus public interest. While markets are the place to strive for private results and the task of governments is to take care of *res publica*, CSR is concerned with something cross-cutting: private enterprise contributes to the common good. In the first chapter a paragraph title reads: “Defining CSR”. It happens to circle around the subject and collects descriptions of examples, indications and rather vague characterisations. So much is clear: CSR is a diffuse concept certainly not easy to get to grips with! It does therefore not surprise that this paragraph concludes to take the well-known People-Planet-Profit approach of the Dutch Social Economic Council[4] as a basis for further research.

More or less intuitively one might presume an interesting connection between CSR and corporate governance (corp. gov.).[5] Perhaps on second thoughts there might not be such a connection. CSR is about policies, corp. gov. is about powers and procedures. Corp. gov. is format, so to speak, CSR is content. Of course, the question who has the corporate authority to decide on societal responsibilities is very relevant. And the other way around, the

[1] ISBN 978-90-13-07672-1 (XXXI + 774 pages)

[2] Tineke Elisabeth Lambooy is affiliated with the University of Utrecht and Nyenrode Business University

[3] Summaries in the Dutch, Spanish, Chinese, Russian, Arabic language, a bibliography (of 70 pages!) and an index of key words are included

[4] Dutch short reference: SER. The relevant report dates 15 December 2000 and has the beautiful title “De Winst van Waarden” (The Profit of Values)

[5] Lambooy, Chapters 2 and 3

question which stakeholder group is able to have an influence on the corporate agenda is relevant as well. But these considerations do not credibly establish an interconnection. In the book under review here corp. gov. is but one of six (semi-)legal so-called frameworks which are supposed to be relevant to CSR. Beside in full-fledged legislation – so to say *hard* law – corp. gov. rules are partly incorporated into codes of conduct, in legal circles often referred to as *soft* law. Some corp. gov. codes contain some rules on CSR subjects. In such cases, to be honest, there is a closer relationship between the two phenomena. One step further on the path to CSR brings us private international rules and guidelines with societally desirable content. These sort of soft rules lack enforcement by competent authorities. The famous comply-or-explain technique can then be used to legalise these weak rules, to draw them carefully but slowly into the legal domain. It is a first and effective step because companies need to publish a valid reason not to comply and therefore are forced to pay serious attention to CSR subjects.[1]
A basic economic model is supply and demand. Let the market work is an alternative model supporting CSR. Here again the law is instrumental in the sense that consumers have a right to know what is in the product. If a consumer can search the package for CSR-sensitive product information, consumer good markets can operate in favour of societally desirable outcomes.[2] REACH[3] is an important instrument firmly based in European law and aimed at the protection of human health and environmental nature from chemical substances even at nanoscale. The case studies[4] are illustrative supplements to the first part of this book. Most of them have an environmental focus. These chapters complete this book that comes near to a catalog of legally related issues of CSR.

Recently the Maastricht University Faculty of Law has founded the Institute for Corporate Law, Governance and Innovation Policies (ICGI). Even a new research magazine has been announced and two extraordinary professors have presented their inaugural speech on the same day: 20 October 2011. The professorial holder of the Chair Corporate Social Responsibility and Innovation shows the struggle with a number of components to determine the specific content of CSR. In his lecture entitled **In Pursuit of Corporate Sustainability and Responsibility** he confessed that for some twenty years he had strongly believed that the law should not interfere with the implementation of CSR. But sadder and wiser having diagnosed that CSR is hardly disseminating the business community his plea is now for a stronger regulatory framework to support CSR implementation.[5] It is most certainly not a coincidence that the accompanying professorial lecture is in search for a proper legal approach under the pregnant title **Corporate Responsibility, Beyond Voluntarism**.[6] Fruitful insights have been offered beyond the dichotomy voluntary versus mandatory. CSR, according to a former Unilever CEO "in its core nothing more than decent business"[7], does not contain one single norm but is itself a container of principles and open norms like reasonableness and fairness.[8] The legal reasoning is interesting but I am not sure

[1] Lambooy, Chapter 6
[2] Lambooy, Chapter 8
[3] Registration, Evaluation, Authorisation and Restriction of Chemical substances
[4] Lambooy, Part II, Chapters 9-13
[5] Sybren Christiaan de Hoo, In Pursuit of Corporate Sustainability and Responsibility: Past Cracking Perceptions and Creating Codes, Inaugural lecture, Maastricht 20-10-2011, pp 30, 59, 66
[6] Jan Eijsbouts, Corporate Responsibility, Beyond Voluntarism – Regulatory options to reinforce the licence to operate, Inaugural lecture, Maastricht 20-10-2011
[7] Eijsbouts, p 10
[8] Eijsbouts, pp 25-26

whether the plea for legal pluralism relative to CSR gains persuasive force while intertwining it with Corporate Governance.[1] It confuses the debate which focus becomes less clear.
To sum up: there is a lot of law in CSR, normative content as well as instrumental support. CSR is a perfect case to show that business ethics and societal integrity go beyond legal relevance but lawyers can extend a helping hand to the implementation of ethics and integrity.

The **Handbook on Law, Innovation and Growth, edited by Robert E. Litan and published by Edward Elgar, 2011**[2] fits seamless in this line of thinking. This book contains a number of interesting connections between law and innovation. Whether instrumental or normative, bankruptcy laws are believed to send signals to entrepreneurs producing innovation through competitiveness. In Europe, and therefore in The Netherlands, it is widely believed that the U.S.A. bankruptcy laws are friendly to entrepreneurs who often finance their enterprises for a large part with personal debt. There goes a saying at this side of the Atlantic that Americans dare to take the risk of going bankrupt while in our EU member state an entrepreneurial failure is a disgrace. Therefore, there seems to be a movement in Europe to make bankruptcy laws more debtor friendly. At the same time in the U.S.A. there is growing consent to hold people more responsible for paying their debts and a creditor-friendly bankruptcy law is recently passed! Presumably the truth is somewhere in between: entrepreneurs should be responsible business persons and competitiveness and innovation should not be financed unilaterally by business creditors.[3]
Entrepreneurial finance adventures is a coin with two sides, obviously. So is another legal connection to innovation: non-compete clauses in employment law contracts. These clauses hinder worker's mobility and as a consequence industrial knowledge how to use new findings for the development of product innovation stays within the knowledge developing organisation. This is of course exactly the purpose of these clauses. An advantage at the micro organisational level turns out to be a disadvantage on an aggregate level. Innovative knowledge is not widely spread in industry.[4]

To lawyers it is an annoying stereotype to suppose over and over again that the active number of Intellectual Property Rights (IPRs) is a reliable indicator for a certain level of innovation and therefore economic progress. Although this supposed relationship is a widespread belief, it certainly is not true. The reason why is simply understood. On the one hand many registered IPRs are based upon innovations of years ago and on the other hand for a lot of innovations the procedure for the official attribution of an IPR has never been started. That is because of the great disadvantage of every patent to be granted: publicity. The protected knowledge incorporated in the registered IPR is accessible to the public and the curious competitor. The disadvantage of public knowledge might outweigh the exclusive right of legal protection.
Reasons not to patent a recent major technology innovation have been researched as well. Most frequent reported reason in this survey was the cost of obtaining the patent to be granted. Among other interesting reasons mentioned by respondents were not wanting to

[1] Eijsbouts, pp 41-42
[2] ISBN 978 1 84844 187 3 (vii + 332 pages)
[3] Florian Ederer and Gustavo Manso, *Handbook*, Chapter 5, "Incentives for innovation: bankruptcy, corporate governance, and compensation systems", pp 90-111 at pp 96-97
[4] *Handbook*, Chapter 5, p 106

disclose innovative information and the opportunity for competitors to invent around the granted patent which content has been made public.[1]
Indeed, empirical analysis is most welcome[2] because the presumption based on the just mentioned widespread belief is rather opaque. It appears that much work is to be done for instance on the costs of the IPR system. It is also suggested to focus more on IPRs from an antitrust law perspective because IPRs can constitute monopoly power. Although the granting of IPRs results in a more comfortable position in terms of being less vulnerable to competitive restraints, on the other hand the stronger the market position the more careful the market conduct of the business organisation should be from an antitrust perspective.

Are attorneys little more than necessary evils or can lawyers be valuable members of entrepreneurial teams?[3] Many suggestions have been offered on how law schools could play a critical role in the creation of entrepreneurial lawyers. I am sure that the idea of interdisciplinary courses in which law students work in teams with students from business studies is appreciated by O.F. as well as it is by me. But having an affiliation with a business school – to be precise: the School of Management and Governance of the University of Twente, The Netherlands – the best we can do is paying attention to the binary role of the law regarding the management of business organisations: the normative significance of rules and regulations and the operational benefit of supportive legal instruments as well. Assessing the legal performance of management is about judging both the level of compliance to rules and regulations and the proper use of legal instruments by management to support the mission of the company. A great help to develop a comprehensive managerial approach to business legal affairs is attractively presented in the following book.

George Siedel and Helena Haapio, Proactive Law for Managers – A Hidden Source of Competitive Advantage, Gower Publishing, Farnham England and Burlington USA 2011[4]
The central theme of this book is that the conventional way to handle legal affairs is a reactive one that is seldom conceived an incentive for prevention. Legal problems are, so it seems, incidents of bad luck. They just happen and can not be predicted. The idea of *proactive law*[5] is mainly that learning from the occurrence of legal problems can produce competitive advantage. It certainly helps that managers understand the law and know how to handle legal problems. But it is not enough in terms of proactive law. The management can gain competitive advantage if a legal incident is used as an opportunity to develop strategies to prevent the ever-recurring of those problems. For instance, a product liability case is a perfect chance to investigate how the defect in the product that caused the damage could become part of that product. Such an investigation can result in a renewed and improved design and, therefore, the marketing of a safer product. Proactively exploiting legal problems results in competitive advantage and prevents further problems. A related slogan reads: “reframe legal concerns and develop new business opportunities”.
In the concluding chapter the authors make plausible that ethics, law and profits form an interrelated triangle. Based on earlier research by others the book shows how astonishing

[1] Ted M. Sichelman and Stuart J.H. Graham, *Handbook*, Chapter 9, “Why do entrepreneurs patent?”, pp 212-244 at pp 228-232
[2] Jonathan D. Putnam and Andrew B. Tepperman, *Handbook*, Chapter 6, “Intellectual property rights and economic progress: a review of the literature”, pp 112-150
[3] Anthony J. Luppino, *Handbook*, Chapter 12, “The value of lawyers as members of entrepreneurial teams”, pp 300-321
[4] ISBN 978 1 4094 0100 1 (xix + 172 pages)
[5] *See* www.proactivelaw.org and www.preventivelawyer.org

simple some business decisions can be. Provided, of course, they have been well prepared and documented. Illegal actions should not be taken. Furthermore, it is easy to decide not to take action if it brings no profit and is unethical and on the other hand to go for actions that are ethical and profitable. Hopefully, the management is strong enough to cancel profitable actions if ethical requirements are not fulfilled. Should a proposal for action meets ethical standards but brings no profit, it does businesswise make no sense unless it is decided to proceed for reasons of corporate social responsibility.
This does not imply that CSR always goes without profit. It is common knowledge that things need not yield a profit *per se* to benefit the business in the end.